Robert King d/b/a Regency at the Rodeway Inn *and* Hotel and Restaurant Employees and Bartenders Union, Local 550, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. Cases 31-CA-8996, 31-CA-9007, and 31-RC-4497

April 15, 1981

Decision, Order, and Certification of Results of Election

On April 30, 1980, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge only to the extent consistent herein.

We agree with the Administrative Law Judge that Respondent did not threaten its employees that they would be fired if they signed union authorization cards[3] and that it did not discriminatorily discharge Salvador Rivas, Jr., and Brian Carrick. However, for the reasons set forth below, we find, contrary to the Administrative Law Judge, that Respondent did violate Section 8(a)(1) of the Act by Noleen Jones' interrogation of Emma Lou Warner.[4]

As found by the Administrative Law Judge, in early May 1979, Manager Noleen Jones inquired of Warner if she knew who was passing around a union petition, to which Warner replied that she knew nothing of it. The Administrative Law Judge found that by traditional Board standards Jones' interrogation violated Section 8(a)(1) of the Act. However, he found the alleged violation to be *de minimis* and recommended that no remedial order was necessary for this allegedly "technical violation." We disagree with this conclusion.

The Administrative Law Judge enumerated four reasons for finding this violation *de minimis*. Those reasons are as follows:

> (1) Respondent has committed no other violations of the Act.
>
> (2) The record did not show that anyone other than Warner was informed of Jones' remarks.
>
> (3) At the time of the conversation, Carrick and Rivas Jr. had completed their distribution of union cards.
>
> (4) Jones was later discharged from Respondent, and, in light of her continuing adverse interests to King, it was "completely inequitable" to charge Respondent with a violation of the Act committed by Jones and not authorized nor instigated by King.

Assuming, *arguendo*, the propriety of examining the conduct complained of from the standpoint of whether or not it is *de minimis* so as not to require the Board's remedial action, we conclude that the several factors advanced by the Administrative Law Judge are not sufficient alone, or in concert, to sustain his finding. Thus, for example, we think it irrelevant that some particular union activity that is the object of an interrogation may have ended

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. In affirming his resolutions, however, we put no reliance on the Administrative Law Judge's conclusion that Robert King's supposed "degree of sophistication relative to unions" made unbelievable Noleen Jones' testimony as to what King told her about his employees' unionization efforts.

We also correct the following inadvertent errors in the Administrative Law Judge's Decision: (1) at sec. III,A, par. 17, Salvador Rivas, Jr., testified that Emma Lou Warner, not Margaret Palmer, asked him to start work early, and (2) Rivas Jr. indicated that he began work in February 1979, not in mid-April 1979 or "three weeks before Mother's Day" 1979 as referred to by the Administrative Law Judge.

[2] In adopting his findings that Rivas Jr. and Brian Carrick were not unlawfully discharged, we disavow the Administrative Law Judge's reliance in sec. III,B,1, of his Decision on *Propak Corporation* v. *N.L.R.B.*, 578 F.2d 169 (6th Cir. 1978), and *Delchamps, Inc.* v. *N.L.R.B.*, 585 F.2d 91 (5th Cir. 1978). In this regard, we reiterate that administrative law judges are to apply established Board precedent that has not been reversed by the Board or the Supreme Court. *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963).

We also disavow any reliance the Administrative Law Judge may have placed on the fact that Carrick "believe[d] he was going to be fired eventually" as Carrick's subjective view of the situation is irrelevant to our determination of whether, in fact, he was unlawfully discharged. And, with respect to the alleged 8(a)(1) threat by Emma Lou Warner to employee Margaret Palmer (see fn. 3), we disavow any reliance that the Administrative Law Judge may have placed on the fact that no other waitresses testified to the alleged remarks by Warner. See *Hitchiner Manufacturing Co.*, 243 NLRB 927 (1979). We also place no reliance on the Administrative Law Judge's comments at sec. III,B,1, par. 3, to the extent that they imply that in certain instances an employee's engaging in union card solicitation because of a concern over the security of his job may be unprotected activity. Finally, the General Counsel contends that the Administrative Law Judge was in error in placing reliance on a timecard that allegedly was Rivas Jr.'s for the period encompassing May 13, 1979, the date of Rivas Jr.'s alleged misconduct. We reject the General Counsel's contention which is premised on a showing that Rivas Jr.'s work schedule and the timecard differed in a number of respects. Assuming this to be the case, there is no showing that the work schedule is a more accurate basis than the timecard for determining the hours worked and no proof that Rivas Jr. actually worked his work schedule and not the times shown on the timecard for the period in question.

[3] The complaint alleged that Emma Lou Warner threatened waitress Margaret Palmer and other unspecified waitresses that they would be fired for signing union authorization cards. Warner denied making such statements. The Administrative Law Judge credited Warner's denial and dismissed that 8(a)(1) allegation.

[4] On the last day of the hearing in this case, the General Counsel amended the complaint to allege an additional violation of Sec. 8(a)(1) due to the interrogation of Warner by Jones.

by the time of that interrogation. Similarly, in determining whether a particular act warrants finding a violation and affording a remedy, it is irrelevant that the respondent may not have engaged in other unlawful acts, or that the statutory rights of only a single employee are violated, or that the employee whose rights have been violated has not communicated that fact to others.[5]

Because the Administrative Law Judge found the alleged 8(a)(1) violation to be *de minimis*, he failed to pass on whether Warner was a supervisor or employee. Since we reject the finding that this violation is *de minimis*, we must therefore resolve Warner's employment status.[6]

Noleen Jones testified that she believed Warner to be a supervisor because Warner did all the scheduling for the waitresses, hired waitresses and busboys, and received a higher hourly wage than the other waitresses in addition to receiving $125 a week that Jones said was payment for Warner's "managerial duties." Jones admitted, however, that her basis for saying that Warner was involved in hiring was that Jones did not hire employees and that she concluded the only other person with this authority would have been Warner. On cross-examination, Jones admitted that she was "not sure" whether Warner had hired anyone in the first 4 months of 1979.

Margaret Palmer testified that Warner handled scheduling and the assignment of waitresses when other waitresses were absent, and instructed waitresses about their job duties. On cross-examination, however, Palmer admitted that (1) although Warner did the scheduling, the waitresses told Warner what time they preferred to work and the schedule rarely changed, (2) Warner was not the only employee of Respondent who called waitresses to replace other waitresses, and (3) while Warner did oversee the waitresses, all of Respondent's waitresses were longtime employees and did not need much guidance.

Warner testified that her title was "head of banquets" and that she booked banquets, ordered supplies for banquets, waited on tables, and cleaned up after banquets. As for "supervisory" duties, Warner testified that from January to April 1979 she merely assisted in organizing the waitresses' schedule and she denied any role in the hiring and firing of waitresses. Finally, Warner testified that, while other waitresses were paid $2.90 per hour, she was paid at the rate of $3.50 per hour, plus she split with the busboy the 15-percent tip charged at banquets. Warner explained that the difference between her wages and those paid other waitresses was understandable since Warner had been with Respondent longer than any other waitress and there was a considerably larger amount of cleanup work for banquets.

We conclude that the testimony of Jones and Palmer, even if credited, would not conclusively establish that Warner was a statutory supervisor. Furthermore, Warner's testimony contradicts that of Jones and Palmer in material respects and would establish Warner's employee status. While the Administrative Law Judge did not set out credibility resolutions here, we note that in other aspects of their testimony the Administrative Law Judge *generally discredited* Jones and Palmer and *generally credited* Warner. These resolutions included *specific* instances where Warner's testimony was credited over contrary testimony of Jones and Palmer. Given these circumstances, we shall credit Warner's testimony on her alleged supervisory status over any contrary testimony by Jones and Palmer.[7] Having done so, we find that Warner was an employee under the Act. Hence, we find her interrogation by Noleen Jones to be an 8(a)(1) violation and we find that it will effectuate the purposes of the Act to provide a remedial order for the violation found here.[8]

[5] With respect to factor 1, see, e.g., *Container Corporation of America*, 244 NLRB 255 (1979); *Clinton Foods, Inc. d/b/a Morton's IGA Foodliner*, 237 NLRB 667 (1978); *Carolina American Textiles, Inc.*, 219 NLRB 457 (1975). With respect to factor 2, see, e.g., *Brooks Camera, Inc.*, 250 NLRB 820 (1980). With respect to factor 3, cf. *Richard Tischler, Martin Bader and Donald Conelly, Sr., a limited partnership d/b/a Devon Gables Nursing Home, et al.*, 237 NLRB 775, 777 (1978). With respect to factor 4, cf. *Gary Aircraft Corporation*, 190 NLRB 306, 310–311 (1971).

Moreover, despite the fact that this case falls outside the parameters of the *de minimis* rule for the reasons stated above, Chairman Fanning and Member Jenkins note their disagreement with the *de minimis* principle in general. In the case cited by the Administrative Law Judge in support of his *de minimis* finding, *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976), Chairman Fanning dissented and would have found an 8(a)(1) violation. In other instances, both Chairman Fanning and Member Jenkins have disagreed with the application of this principle as first espoused in *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show)*, 202 NLRB 620 (1973). In *Jimmy Wakely*, a case in which neither Chairman Fanning nor Member Jenkins participated, a Board panel, after setting out the relevant evidence involved in that complaint's allegation, concluded that that complaint should be dismissed where:

> . . . the [alleged unlawful] conduct involved was so minimal and has been so substantially remedied by the Respondent's subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy.

Chairman Fanning and Member Jenkins have consistently and continually refused to endorse that principle. See, e.g., *United States Postal Service*, 242 NLRB 228 (1979); *Gray Lines, Inc.*, 209 NLRB 88 (1974).

[6] We note that, in his discussion of this alleged violation, the Administrative Law Judge cited *Dependable Lists, Inc.*, 239 NLRB 1304 (1979), and *Campbell Soup Company*, 225 NLRB 222 (1976), apparently for the proposition that a violation was established whether Respondent *considered* Warner a supervisor or an employee, if in fact she was an employee rather than a statutory supervisor.

[7] See, e.g., *Apollo Tire Company, Inc.*, 236 NLRB 1627, fn. 5 (1978).

[8] See, e.g., *Clinton Foods, Inc.*, *supra*.

AMENDED CONCLUSIONS OF LAW

Substitute the following Conclusion of Law 3 for that of the Administrative Law Judge:

"3. By interrogating an employee as to her knowledge of the union activity of other employees, Respondent has engaged in unfair labor practices as defined in Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Robert King d/b/a Regency at the Rodeway Inn, Bakersfield, California, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their knowledge of other employees' union membership, sympathies, or activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at his restaurant in Bakersfield, California, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all allegations of the complaint which charge Respondent with unfair labor practices other than those found herein be, and the same hereby are, dismissed.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Hotel and Restaurant Employees and Bartenders Union, Local 550, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees in the unit herein involved within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that I have violated the National Labor Relations Act, as amended, and has ordered me to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

I WILL NOT interrogate employees about their knowledge of other employees' union membership, sympathies, or activities.

I WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them under Section 7 of the Act.

ROBERT KING D/B/A REGENCY AT THE RODEWAY INN

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at Bakersfield, California, on November 8 and 9, 1979,[1] pursuant to an order consolidating cases and consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 31 on June 21. In addition, on August 20, the Regional Director ordered consolidated certain issues arising from a representation election in Case 31-RC-4497. The complaint, based upon charges filed on May 14 (Case 31-CA-8996) and May 16 (Case 31-CA-9007) by Hotel and Restaurant Employees and Bartend-

[1] All dates herein refer to 1979 unless otherwise indicated.

ers Union, Local 550, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (both cases) (herein called the Union), alleges that Robert King d/b/a Regency at the Rodeway Inn (herein called Respondent), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (hereinafter the Act).

The Union's representation petition was filed on April 27, and sought a representation election among all of Respondent's restaurant employees except for head chef, head waitress, assistant manager, and manager. An election was held pursuant to a Stipulation for Certification Upon Consent Election on June 29. A timely objection to conduct affecting the outcome of the election was filed by Respondent on July 6. On August 20, the Regional Director for Region 31 concluded his investigation and recommended that Respondent's objection be overruled in its entirety. In addition, it appears from the tally of ballots that, of approximately 39 eligible voters, 18 cast ballots, of which 8 were cast the Union, 8 were cast against the Union, and 2 were challenged. Of the two, the Regional Director found that Margaret Palmer was ineligible to vote as she had been discharged on May 22.[2] The Regional Director also found that the matter of the ballot of Salvador Rivas, Jr., should be consolidated with the unfair labor practice charge in which Rivas Jr. is one of the two alleged discriminatees. His vote is sufficient to affect the outcome of the election.

Issues

(1) Whether Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully discharging Brian Carrick and Salvador Rivas, Jr.

(2) Whether Respondent violated Section 8(a)(1) of the Act by unlawfully threatening and interrogating certain of Respondent's employees.

(3) Whether the challenge to the ballot of Salvador Rivas, Jr., should be overruled.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a sole proprietorship, duly organized under and existing by virtue of the laws of California, consisting of a restaurant and office located in Bakersfield, California. It further admits that during the past year, in the course and conduct of its business, its gross volume of business exceeded $500,000, and that annually it purchases and receives goods or services valued in excess of $2,000 from sources outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Hotel and Restaurant Employees and Bartenders Union, Local 550, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[3]

Respondent Robert King (hereinafter King) owns two motels in Bakersfield, California. The Rodeway Inn was acquired in April 1975, but not operated by King until April 1979 when he took over from his father, George King. The Holiday Inn was acquired and operated since July 1976. Most of the events at issue in this case concern the Rodeway and, specifically, the Regency restaurant at the Rodeway which, along with the Rodeway, had been losing substantial sums of money prior to the April takeover by King. The problem had led to a recent bankruptcy of the prior lessees of the restaurant before George King took over. Under his supervision, the motel-restaurant operation did not substantially improve. Either as a result, or as the cause, of these money-losing ventures, George King spent all or most of his working time in the Regency bar drinking to excess. He did not testify at the hearing and I do not regard him as a major figure in the case. However, the former Rodeway-Regency manager, Noleen Jones, did testify and is an important, if not critical, witness in this case. I will examine her testimony in some detail.

Jones began working at the Rodeway in 1975 and was fired by King on May 13 when she received a telephone call from him at her home. During the time that George King operated the business, Jones was responsible for virtually the entire operation, including all hiring, firing, and training of employees, bookkeeping, and payroll. Her personal relationship with George King was good, but her personal relationship with Robert King was poor. The latter felt that a personal relationship had developed between his father and Jones which had resulted in a near divorce between King's mother and father. At the hearing, Jones denied any personal relationship with George King and it is immaterial to the case as to the fact of this matter. Suffice it to say, Jones did not like Robert King and he did not like her.[4] For this reason,

[2] Her discharge was the subject of an unfair labor practice charge which the Regional Director dismissed on June 21. No appeal was taken. Palmer was a witness in the instant case and her testimony is reported in "The Facts."

[3] The General Counsel's uncontested motion to correct the transcript is granted

[4] At different times in the course of her testimony, Jones described her relationship with Robert King: Someone who does not keep promises, not her favorite person, personality clashes, animosity both ways, unfair, someone who lived beyond his means, pompous, and unqualified to run two motels. Jones also admitted that she may have told another employee before she was fired that Robert King was a son of a bitch and that he

Continued

Jones never expected to continue her job after George King stepped down, but she agreed to stay on for a limited period as a personal favor to George King.

Shortly after King took over operation of the Rodeway-Regency, he had two meetings with certain management employees, including Jones. The others attending the two mid-April meetings were Salvador Rivas, Sr., head chef, who was subsequently fired by King, and Emma Lou Warner, an alleged waitress-supervisor.[5] The meetings occurred in Jones' office. King stated that food and labor costs were too high. He wanted both cut and, as to labor costs, King indicated that two or more persons in the kitchen would have to be discharged. Rivas Sr. told King that he did not think he could reduce food costs from over 50 to 37 percent of gross revenues as King demanded. Rivas Sr. thought that 44 percent was possible. The second meeting, about 1 week later, covered the same topics and again it was agreed that two cooks would be laid off to reduce costs. No names were stated.

After Robert King took over, and before he fired Jones, it was his custom to call her every morning to receive reports on the prior day's business activity. According to Jones, King called her in early May and told her that he had heard from a source he refused to identify that Rivas Sr. and his son, Rivas Jr., the alleged discriminatee, were passing around a union petition in the restaurant. Jones first expressed doubt of any union activity afoot as she had heard nothing about it, then she told King, if anyone were involved, it was Brian Carrick, another kitchen employee and the second alleged discriminatee.[6] Jones went on to testify that, subsequent to King's telephone call, she immediately sought out Warner and told her that King had just reported that the Rivases were passing around union petitions. Warner allegedly told Jones that it was not the Rivases, it was Carrick and another person named Rodriguez. The afternoon of that same day, according to Jones, King met with her at her office. Jones reported that Warner had said it was Carrick passing around the petition. Then King allegedly said he would have to let them all go because he could not afford any union trouble. Jones tried to change King's mind as she believed that Rivas Sr., in particular, had done a good job as head chef. King refused to reconsider and directed Jones to call Rivas Sr. at home on the following Sunday evening and tell him he had been discharged.

King denied making this and other statements attributed to him by Jones. He admitted telling Jones to fire Rivas Sr. not for any reason related to union organizing, but because he felt that someone else could do a better job in controlling food and labor costs. King had spoken to Barney Velay, who was then working as a cook at King's Holiday Inn, about replacing Rivas Sr. Velay had previously worked as a head chef and promised to reduce food costs below what Rivas Sr. said was possible; he made no commitment as to labor costs, telling King he would have to start his new job and assess the situation.

I credit King's denial and disbelieve Jones in this and later conflicts in the evidence. First, it is clear that Jones had a motive to fabricate her testimony not only because she was fired by King, but also because of the longstanding bad feeling between the two of them (see fn. 4). Because of this long history of antagonism between Jones and King, I simply cannot believe that King would have made statements to her reflecting his illicit strategy for defeating the Union. In my view, such conversations are inherently improbable. Moreover, Jones is not corroborated by other witnesses here and elsewhere in her testimony. For example, Warner testified that Jones may have asked her who was passing a union petition around, to which Warner replied that she knew nothing about it. Warner denied mentioning the names of specific individuals who had signed cards, contrary to Jones' testimony, and Warner also denied that Jones had told her that the Rivases were passing out union cards. The fact is that Brian Carrick, a relief cook and baker, and Rivas Jr., also a cook, had been passing out union cards on the afternoon and evening shifts at the Regency. They began passing out cards on April 18. Some of the cards were picked up from the union hall in Bakersfield, and other cards were dropped off at the restaurant by a union official.

Jones continued in her testimony to describe the phone call to Rivas Sr. on Sunday evening, May 6. According to Jones, she told Rivas Sr. he was fired on orders of King. When Rivas Sr. asked why, she said that someone had told King that he and his son were passing a union petition around and it was for that reason. Rivas Sr. told her it was Carrick who was passing around union cards and Jones testified she repeated this to King in the next morning's telephone call. To this, King allegedly responded, "Well, maybe we made a mistake in letting him go." Then King added, if Brian was passing the petition, he would have to let him go.

Rivas Sr. described the telephone conversation with Jones on May 6 somewhat differently. Jones said she did not know why he was being fired as his food report had been good for the prior week. Then, according to Rivas Sr., Jones added, "The only thing she could think of was that I was in union activities," which was not true. Jones agreed, saying she knew it was "your son and Brian." Jones finished by saying, "Outside that, I don't know why you're getting laid off."

I credit the account of this conversation as provided by Rivas Sr. Surely, as a discharged employee and with his son as an alleged discriminatee, he would have no reason to shade his testimony in favor of King. Yet his testimony tends to support King's account as to why he was fired and tends to discredit Jones' account of the conversation. I disbelieve and discredit all of Jones' testimony relative to King's alleged remarks about unions.

Jones continued in her testimony as to a meeting in her office on May 7 with King and the newly hired chef, Velay. The discussion allegedly concerned when to fire

was not doing a good job running the Rodeway. Similarly, in the course of his testimony, Robert King stated that Jones was doing a poor job, that he had never liked or trusted her, and that she had been the cause of a near divorce between his father and mother.

[5] The issue as to Warner's supervisory status will be considered below.

[6] The record is silent as to why Jones thought that Carrick was involved in union activity.

Carrick. Velay reportedly said he had found a replacement, but that person could not be in until later in the week. King then signed a blank check instructing Jones to fill in the correct amount as determined by when Velay fired Carrick. Jones testified that on May 9 she received a phone call from Velay telling her to make out the check for Carrick's time, including that Wednesday, as Carrick would be fired that day at the end of his shift.

In fact, Velay did fire Carrick on May 9, just a few days before Mother's Day, the busiest restaurant day of the year. Velay denied that King told him to fire Carrick or anyone else. He was told to reduce labor costs and he decided on his own to reduce the staff by two. This was Carrick and another person who never returned from his vacation and was not replaced. Velay also denied the May 7 conversation as reported by Jones. Velay testified that he fired Carrick when he did as he was under pressure from King to make immediate reductions in labor costs and because he wanted to bring in some of his own people to counter staff animosity caused by the discharge of Rivas Sr. and the prospect of other terminations. In retrospect, he regretted firing Carrick before Mother's Day. There was no replacement for Carrick, but another employee was shifted to do part of Carrick's work and Velay did the rest.

Carrick testified as to his conversation with Velay at the time of the firing. Velay allegedly said that Carrick was the best man there, but that King wanted him out of there as he was causing too much static. Carrick expressed surprise at the timing of the firing just before Mother's Day, although he did believe he was going to be fired eventually. Velay agreed it would be rough without him on Mother's Day. Carrick believed he was being fired for trying to organize the Union.

Velay testified that he could not recall what he may have told Carrick when he fired him. He may have made up some kind of an excuse rather than tell the real reason. He flatly denied saying Carrick was causing too much static. Finally, Velay denied that Carrick's union activities were known to him or affected his decision to fire Carrick.[7]

Like Velay, King denied the conversation referred to above, and I credit his denial. King also denied leaving Jones a blank check to give to Carrick. Given King's personal feelings as to Jones and the fact that it was King's daily habit to go home for lunch every day on a route which took him near the Regency, it was highly unlikely that he would sign a blank check for Carrick. It would have been a simple matter for him to stop in at the Regency on very short notice to sign the prepared check. Moreover, I believe Velay when he testified it was his decision alone to fire Carrick.[8]

I return again to Jones' testimony: On May 11, Jones spoke to King by telephone and allegedly told him that she was going to a local lake for the weekend and she asked whether any other payroll checks were to be given out while she was gone. King said no, and, when Jones inquired as to Rivas Jr., King stated that Velay had not been able to replace him yet. Again, I credit King's denial of this incident. He testified that he was in Fresno on business when he was allegedly called by Jones and he never spoke to her at all.

Rivas Jr. was in fact fired by Velay about 1 week after Mother's Day. There is no dispute as to preliminary events. Rivas Jr. began working at the Regency as a relief cook about 3 weeks before Mother's Day. His normal Sunday shift was from 6 a.m. to 2 p.m. However, on Mother's Day, Rivas Jr. had been scheduled in advance by his father to work from noon to 8 p.m. After Rivas Sr. had been fired, Velay had announced that all work schedules would remain in force.

Rivas Jr. testified that he arrived at the Regency on Mother's Day, May 13, about 11 a.m., and went into the bar to drink orange juice and watch a baseball game on television until about 11:45 when he punched in. About 11:30 a.m., Palmer asked him to start early and Rivas Jr. said that he could not do that unless the head chef requested him. Palmer answered that the cooks were swamped with work and Rivas Jr. replied, "It's not my responsibility." After he began working, Velay never discussed the matter with him and he did his job until his shift was completed. On direct examination, Rivas Jr. added that the day after Mother's Day he had a conversation with Velay at work. Rivas Jr. asked Velay if he were the next to be fired. Velay allegedly replied, "No." Velay also said that he was happy with Rivas Jr.'s work and that if anybody was going to fire Rivas Jr. it would be Velay. Finally, if anyone went over his head, Velay would quit. On cross-examination, Rivas Jr. admitted that the conversation with Velay occurred a few days before Mother's Day, rather than the day after.

The above version of events is contradicted by several witnesses and an important document. First, Velay and another cook named Aaron Hosey both testified that Rivas Jr. did not report for work until 12:45 p.m. Then Rivas Jr. went to the bar where he remained until about 1:30 when he finally began to work. Hosey's testimony, in particular, was convincing because he had to perform extra work to compensate for Rivas Jr.'s absence and for that reason would have noted when Rivas Jr. began to work. Warner also testified that Rivas Jr. was at the bar on the day in question drinking VO and water. Warner had a conversation with Rivas Jr. about 12:30, when she told him, "Sal, you're supposed to be back there work-

[7] I believe that Velay may well have told Carrick that he was being fired on orders of King. This does not make it so. In his testimony, Velay made a few references to staff resistance to his leadership. Not only was he expected by King to reduce costs, but he was also perceived by employees as the cause of Rivas Sr.'s departure. By referring to King in his conversation with Carrick, he was attemping to defer additional staff animosity directed toward him. This theory finds support in other testimony of Carrick, who candidly testified that rumors of staff cutbacks involving between two and five kitchen employees were rampant in early April. These rumors predated Carrick's union activities. In fact, in early 1979, Carrick was cut back from 6 to 5 days a week. Furthermore, Carrick candidly admitted that he considered himself vulnerable to a layoff as the Regency could probably do without a baker.

[8] In evaluating Velay's credibility, I was not overly impressed with his demeanor. However, I find that his somewhat evasive appearance was due not to lack of truthfulness, but to the ravages of overindulgence in alcohol. Indeed, Velay admitted that he drank in great quantities and was even cut off at the Regency because he drank to excess. However, the primary reason I believe him and not Jones is that his testimony is consistent with other witnesses who support King, while Jones' testimony is inconsistent, contradictory, and inherently incredible.

ing." Rivas Jr. answered, "I'm going to watch the game. I'm not scheduled to go on." Rivas Jr.'s timecard shows that on May 13 he punched in at 12:45.

In evaluating the credibility of Rivas Jr. I disbelieve all or most of his testimony as summarized above. He even denied that the timecard with his name on it was his. Rivas Jr.'s testimony is incredible, highly improbable, and preposterous. He is contradicted by three persons whose testimony on this point was convincing and consistent, and the timecard as well, which as a bona fide business record is highly convincing.

A few days after Mother's Day, Velay called Rivas Jr. at home and said he was no longer needed. Rivas Jr. was replaced with a man named Webster, whom Velay described as a member of Local 550. Webster had been hired before Rivas Jr. was fired, but, subsequent to Rivas Jr.'s discharge, Webster was transferred to his job.

The final major conflict in the evidence concerns certain statements allegedly made by Warner to waitresses at the Regency. Margaret Palmer, a waitress from April 1976 to May 22, 1979, when she was fired by Velay, testified that in mid-April she signed a union card and returned it to Carrick. Subsequently, on several occasions, until she was fired, Warner said to her and other waitresses that, "If you sign the union card, or join the Union, you know you'll be fired immediately." Neither she nor the other waitresses ever responded to the statement, although the waitresses discussed the matter among themselves. Warner denied making the statement in question.

I cannot credit the testimony of Palmer on this record. First, no other waitress testified to the statement, although others allegedly heard it with Palmer. Next, Palmer admitted on cross-examination that she was angry and upset about being fired by Velay for stealing. Moreover, she had not gotten along with Velay at all as he had accused her on several prior occasions of stealing. All of this testimony tends to show a motive for Palmer to fabricate her testimony. Finally, on cross-examination, Palmer was impeached on several material aspects of her testimony based upon her prior affidavit to the Board.

B. *Analysis and Conclusions*

1. The alleged 8(a)(3) violations

I begin with the testimony of Sal Rivas Sr. a generally credible witness. He testified to two early April meetings shortly after King took over operation of the Regency restaurant. Among other matters discussed was the reduction of labor costs through layoff. About this time both Carrick and Rivas Jr. began to hear rumors of possible staff reductions in the kitchen. Both employees had good reason to fear that the reductions could possibly affect them. Carrick had already been cut back 1 day per week in early 1979, along with most of the other kitchen employees. Moreover, based upon his knowledge of operations at the King-owned Holiday Inn where he worked his 2 offdays, Carrick believed that the Regency might not need a baker.[9]

[9] Carrick was terminated from his 2-day-a-week job at the Holiday Inn about 1-1/2 weeks before he was fired from the Regency because a former employee was returning to his old job.

Rivas Jr. had been hired in early to mid-April as a replacement cook so he was possibly the most junior kitchen employee. Rivas Jr. was told by his father that terminations were in the offing. Like Carrick, he heard these reports before he began to pass out union cards. Rivas Jr., who worked on the afternoon shift, initiated the union activity. He was closely followed by Carrick, who worked the morning schedule. Part of their respective shifts overlapped and the two men were friends at work.

I find that in passing out union cards Carrick and Rivas Jr. were motivated at least in part by legitimate concerns over the security of their jobs. This does not make their activities any less protected and I find that prior to their discharges they were both engaging in protected concerted activities.

On this record I cannot find that either King or Velay knew of Carrick's or Rivas Jr.'s union activities. I find that Rivas Sr., a statutory supervisor, did know that the two employees passed out cards in his presence but neither he, nor anyone else, testified that King was so told. This activity ceased by the time Velay started his job and there is no evidence that he knew of these activities. I have discredited the testimony of Jones reflecting that King had discovered the union activity. Nor can I rely upon the relatively small size of the kitchen force in this case as raising an inference of knowledge. King spent most of his worktime at the Holiday Inn and visited the Rodeway only about two times a week. It is unrebutted that King never had any contact with Carrick and I believe King when he testified that he did not even know Carrick.

Prior to the protected concerted activities of Carrick and Rivas Jr. there had been no decision as to who should be discharged. However, it was clear that some Regency employees were to be terminated. Without the testimony of Jones, which I have discredited, and without the requisite knowledge of King or Velay, for the reasons discussed above, the fact that Carrick and Rivas Jr. began their union activities subsequent to Respondent's decision to reduce the kitchen force, precludes a finding that their discharges were based on such activity. *Brown Manufacturing Corporation*, 235 NLRB 1329, 1334 (1978). Accord: *Propak Corporation* v. *N.L.R.B.*, 578 F.2d 169 (6th Cir. 1978). This conclusion is made even stronger by the testimony of Carrick and Rivas Jr. that they considered themselves likely targets of these layoffs for valid reasons not connected to any union activities. Thus, it cannot be found that they were discharged for circulating union cards after the decision had already been made to reduce the work force. *Delchamps, Inc.* v. *N.L.R.B.*, 585 F.2d 91, 94 (5th Cir. 1978).

As to the question of how Carrick and Rivas Jr. were selected, only Carrick was in fact discharged as part of the reduction in force. The record contains a valid management reason as to how Carrick came to be selected. But even if it did not, it would be inappropriate for me to substitute my judgment for that of Velay's. *Florida Steel Corporation* v. *N.L.R.B.*, 587 F.2d 735 (5th Cir. 1979); *N.L.R.B.* v. *T. A. McGahey, Sr., et al., d/b/a Columbus Marble Works*, 233 F.2d 406, 412–413 (5th Cir. 1956).

Nor can I find from this record that King had the necessary degree of union animus. First, both he and Valey testified that Valey made the decision to fire both Carrick and Rivas Jr. These reasons did not include union activity. Between the time King took over and the time of the hearing, the work force was reduced from 93 to 81. Velay testified that in the 6 months before the hearing he fired 10–12 employees. No claim is made that these other persons were terminated for union-related activities.

Although I am unconvinced that the evidence shows animus, that is not to say that I accept all of King's testimony. In light of King's 15 years of experience in the motel and to a lesser degree in the restaurant business, his membership in the Bakersfield Chamber of Commerce and City Convention Bureau, and his selection by the Bank of America as a civic leader and judge for scholarship awards, I discredit and disbelieve his testimony that he did not know that Local 550 or any other restaurant employees' union existed in Bakersfield, that unionization of his business would increase labor costs, and that he was not aware that a Ramada Inn in which he worked for 5 years had a unionized restaurant. It is for the very reason that I believe King had at least a degree of sophistication relative to unions that I cannot believe he made the remarks attributed to him by Jones, who surely was no confidant. Moreover, I cannot reason that, because King was untruthful as to the above-described matters, this raises an inference of animus helpful to the General Counsel's case.

However, because I am convinced that the General Counsel's case is completely without merit, I will assume *arguendo* that the record shows both King's knowledge of union activities and union animus, and that a *prima facie* case has been proven. I still cannot find that Carrick and Rivas Jr. were discharged in whole or in part for engaging in protected concerted activity.

Surely, the evidence as to Rivas Jr. is virtually overwhelming that he was not fired for an improper reason. In spite of the fact that Rivas Jr. had every reason to heed his father's warning as to possible layoff, it is clear that Rivas Jr. would not have been fired but for his misconduct on Mother's Day, as described in "The Facts."

The case for Carrick is closer but I must arrive at the same conclusion. It is closer because the timing of Carrick's discharge shortly before the busiest restaurant day of the year seems suspect. Moreover, Carrick was fired for reasons of economy, yet Velay immediately hired a man named Webster to take his place. Yet these curious facts can be explained in light of the record. Velay testified that he was under pressure from King to reduce labor costs and reduce the staff so he fired Carrick prior to Mother's Day, a deed which Velay now calls a mistake. As to Webster, Velay felt he needed to hire his own people to blunt the employee hostility and noncooperation from Regency employees. Undoubtedly this was caused by employee fear that they might be the next to be fired by Velay. Eventually Webster took the place of Rivas Jr.

In conclusion, I will recommend that the alleged 8(a)(3) violations be dismissed.

2. The challenged ballot of Sal Rivas, Jr.

In light of the above findings regarding Rivas Jr., I will also recommend that the challenge to his ballot shall be sustained and that his vote not be counted in the election. The election in this case was held on June 29, and Rivas Jr. had been discharged by then for good and sufficient reason. He was not entitled to vote.

3. The alleged 8(a)(1) violation

In "The Facts" portion of this opinion, I have found that Warner did not make the statements attributed to her by Palmer; i.e., that any employees who signed union cards or joined the Union would be fired immediately. Accordingly, I will recommend that this portion of the case be dismissed.

Alternatively, the General Counsel argues that Jones conducted a coercive interrogation of Warner when, immediately after an early May telephone call from King, she sought out Warner and made certain statements. There is no question that Jones was a statutory supervisor at the time of her conversation with Warner, but there is conflict as to the status of Warner and as to the content of the conversation. Jones testified that after the telephone call she immediately sought out Warner and told her that King had just reported that the Rivases were passing around union petitions. Jones further testified that Warner replied that it was not the Rivases but Carrick and Rodriguez. Allegedly, Warner also told Jones that she knew some of the people who had signed a union petition: Manny Rodriguez, Alex Cruz, Barbara Jewel Coburn, and Margaret Palmer. Warner recalled only that Jones asked if Carrick and Rivas Jr. were passing around a union petition. Warner replied that she knew nothing about it. Although I credit Warner's account of the conversation, my decision as to this point would remain the same under either version.

In *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975), the Board stated that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act. By this standard, Jones' interrogation of Warner violates Section 8(a)(1) of the Act. This is true whether Warner be considered an employee or supervisor,[10] an issue I have not decided since it is not necessary for resolution of this controversy.

Respondent does not disagree with the above, but contends that any violation of the Act is *de minimus* and undeserving of a remedial order. I agree with this position and will recommend that no remedial order is necessary for this technical violation.[11] As a basis for this finding, I note the following:

(1) Respondent has committed no other violations of the Act.[12]

[10] *Dependable Lists, Inc.*, 239 NLRB 1304 (1979); *Campbell Soup Company*, 225 NLRB 222, 226 (1976).

[11] *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976).

[12] Compare *Florida Steel Corporation*, 235 NLRB 941, 942–943 (1978).

(2) The record does not show that anyone other than Warner was informed of Jones' remarks.

(3) At the time of the conversation, Carrick and Rivas Jr. had completed their distribution of union cards.

(4) Jones has been discharged from Respondent and, in light of her continuing adverse interests to King, it would appear to me completely inequitable to charge Respondent with a violation of the Act committed by Jones and not authorized nor instigated by King.

I will recommend that this case be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

4. The challenge to the ballot of Sal Rivas, Jr., is sustained and his vote should not be counted.

[Recommended Order for dismissal omitted from publication.]